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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

H.J. INC., *et al.*,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The American Institute of Certified Public Accountants is a national association whose membership is limited to certified public accountants. The Institute has approximately 260,000 members, many of whom are regularly engaged as outside accountants to conduct independent audits of the financial statements of business enterprises.

The Institute has a special interest in addressing the proper construction of the phrase "pattern of racketeering activity" as used in the RICO statute. Misinterpretations of the "pattern" element that some courts have adopted permit plaintiffs to misuse RICO's treble dam-

ages remedy and "racketeer" label and thus foster a severe "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). When independent auditors express opinions on a client's financial statements, they become exposed to RICO actions brought by investors, creditors and others who may claim to have relied upon those statements in making investment decisions that ultimately prove unsatisfactory or in entering into business transactions with the auditor's clients that do not meet expectations. Although claimants often allege that outside professionals were implicated in a "scheme to defraud," accountants become subject to treble damages and the appellation "racketeer" for activity that Congress (and the public) never remotely considered to be indicative of organized, habitual criminality.

In its *Sedima* decision three years ago, this Court stated that *some* defects that permit RICO's overly broad application to ordinary civil litigation are "inherent in the statute as written" and that their "correction must lie with Congress." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985).[1] This Court also observed in *Sedima*, though, that it is appropriate for the courts to confine the reach of the statute by giving the "pattern" element a more "meaningful" focus. *Id.* at 496 n.14, 500. Members of the Institute, therefore, along with other professionals and legitimate businessmen and women, have a vital interest in urging this Court to adopt the Institute's proposed "pattern" standard.

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[1] Congress has not acted during the three years since this Court decided *Sedima*. In that time, the use of civil RICO to transform ordinary civil litigation into treble damage federal suits has accelerated to the point that the Judicial Conference of the United States twice has called upon Congress to narrow the reach of civil RICO substantially. *See* Reports of the Proceedings of the Judicial Conference of the United States at pp. 19, 75-76 (1987). These resolutions belie the attempts by the plaintiffs' bar to downplay the seriousness of the threat RICO poses if not interpreted properly. *See, e.g.*, Brief of *Amicus Curiae* Trial Lawyers for Public Justice In Support of Petitioners ["TLPJ Brief"] at 25-26 & n.48.

SUMMARY OF ARGUMENT

I. While Congress did not specifically define the "pattern" element of RICO, the factors that this Court itself identified in *Russello v. United States*, 464 U.S. 16 (1983), for interpreting undefined terminology in RICO —the plain meaning of the term, the legislative intent as reflected in the legislative history, and the impact of the rule of lenity—all support the conclusion that the "pattern" element requires allegations and proof that the criminal activity was indicative of habitual criminal conduct. The plain and ordinary meaning of "pattern" is that the sample is "typical" or "characteristic." RICO's legislative history, moreover, demonstrates that the "pattern" requirement was a critical part of Congress' effort to focus the statute on the kind of habitual criminal activity that Congress felt it could not reach constitutionally by outlawing membership in organized criminal associations. The proper application of the rule of lenity also supports this construction of "pattern."

II. As this Court also indicated in *Russello*, the meaning of a term can depend on the context and structure of the statute in which it is used. In this instance, the application of the "pattern" standard properly varies depending on the RICO subsection at issue. In each instance, there must be allegations and proof of the necessary "relationship" between the alleged "racketeering acts" and the prohibited effect on an enterprise that RICO seeks to protect from being improperly influenced or corrupted. In addition, there must be sufficient evidence of "continuity" to demonstrate the racketeering acts are "typical" or "characteristic." There must be something more than a single criminal episode or transaction, and there also must be allegations and proof that the continuing criminal activity represents a substantial

part of the defendant's relationship with the enterprise (in cases arising under Sections 1962(a) or (b) of RICO) or of the conduct of the affairs of the enterprise (in Section 1962(c) cases).

III. The other interpretations offered by the courts, the parties, and the *amici* fall short of carrying forth the plain meaning of "pattern" and its purpose in the RICO statute. The so-called "multiple transactions" tests create nebulous standards that, as a practical matter in the modern economic world, add little to the express threshold statutory requirement that there be at least two "racketeering acts" within ten years. The test proffered by the Solicitor General similarly fails to provide a clear and coherent standard that would apply across the board to all types of RICO cases in a manner that carries forth RICO's meaning and purpose.

IV. In contrast, the test we outline provides an articulable standard that is capable of being "applied in practice" and "explained to a jury;" indeed, we provide a proposed jury instruction. Moreover, it is consistent with the plain meaning, legislative purpose, and context within RICO of the "pattern" requirement. Applying the proposed test, this Court should affirm the judgment below, because the Petitioners failed in their complaint to allege directly or by inference that the alleged "racketeering activity" represented a substantial portion of the relevant conduct under each of the RICO counts.

INTRODUCTION: A PROPOSED JURY INSTRUCTION ON THE "PATTERN" ELEMENT

As this Court recognized in *Sedima*, civil "RICO is evolving into something quite different from the original conception of its enactors" because private civil RICO suits are being brought "almost solely" against respected and legitimate businessmen and women rather than against the intended target of RICO—members of or-

ganized crime. 473 U.S. at 499-500. One of the principal reasons for this "evolution" is "the failure of Congress and the courts to develop a meaningful concept of 'pattern'" as set forth in 18 U.S.C. § 1961(5). *Id.* at 500. Indeed, Congress crafted the "pattern" requirement as one of the critical elements intended to focus RICO's application on organized crime figures and similar habitual criminals. Through the "pattern" requirement, Congress established a standard for determining if the course of criminal conduct at issue evinces a sample of traits, acts and other observable factors that fairly and reliably "characterize" the accused or the enterprise as corruptly involved in habitual criminal activity.

For the reasons explained below, the proper analysis of the "pattern" requirement—one that is capable of being "appl[ied] in practice" and "explain[ed] to a jury," *id.* at 494-95 n.12—is the following:

> To establish a "pattern of racketeering activity," it must be shown:
>
> (1) That at least two of the acts of racketeering activity were related—
>
> to each other in generating the proceeds for investment in the enterprise [claims under Section 1962(a)], or
>
> to each other in acquiring or maintaining an interest in, or control of, the enterprise [claims under Section 1962(b)], or
>
> to conducting the affairs of the enterprise [claims under Section 1962(c)]; and
>
> (2) That the acts of racketeering activity demonstrated a continuing course of significant criminal behavior, because—
>
> (a) the defendant engaged in at least two of the acts at substantially different times as part of distinct criminal episodes or transactions, and

(b) the acts of racketeering activity constituted a substantial portion of the activity by which—

the defendant generated the proceeds for investment in the enterprise [claims under Section 1962(a)], or

the defendant acquired or maintained an interest in, or control of, the enterprise [claims under Section 1962(b)], or

the affairs of the enterprise were conducted [claims under Section 1962(c)].

ARGUMENT

I. RICO'S "PATTERN" ELEMENT REQUIRES ALLEGATIONS AND PROOF THAT "RACKETEERING ACTIVITY" WAS TYPICAL OR CHARACTERISTIC OF THE CONDUCT OF THE ALLEGEDLY CORRUPT PERSON OR ENTERPRISE.

As this Court recognized in *Sedima*, Congress declined to define the phrase "pattern of racketeering activity." 473 U.S. at 496 n.14. When a term is "not specifically defined in the RICO statute," the Court should " 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello*, 464 U.S. at 21 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). Among the factors used to test this assumption are the evolution of the term during the legislative drafting process, the legislative history of the statute, and the effect, if any, of the rule of lenity. *Id.* at 23-28.

All of these factors support the conclusion that RICO's "pattern" element requires a showing that the "racketeering activity" engaged in was sufficient to characterize the relevant activity as habitual or career criminality.

A. The Plain Meaning Of "Pattern" Is That The Sample Of Actions Is "Typical" Or "Characteristic"

The term "pattern" is generally defined as a "reliable sample of traits, acts or other observable features *characterizing an individual.*" Black's Law Dictionary 1015 (5th ed. 1979) (emphasis added); *see* Webster's Third New International Dictionary 1657 (unabridged 1971) (same). Likewise, "pattern" has been defined as "something representing a class or type . . . . *a regular, mainly unvarying way of acting or doing.*" Webster's New World Dictionary 1042 (Second College ed. 1980) (emphasis added). The Oxford English Dictionary's very first definition of "pattern" speaks of "the archetype; . . . an exemplar." Oxford English Dictionary 565 (1933). Other definitions include "anything fashioned . . . to serve as a model," "a likeness, similitude," "a part shown as a sample of the rest," an "example, an instance; *esp. a typical, model, or representative instance*, a signal example." *Id.* (emphasis added).[2]

In each of the definitions, a single theme dominates: "pattern" means actions that "characterize" or "typify" a person's conduct. Thus, as one circuit aptly concluded, the "pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes." *Lipin Enterprises Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986).

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[2] The one *amicus* brief that actually turned to the dictionary in search of the plain meaning of "pattern" ignored all of these preceding meanings and then selected out of context the word "design" from the following *eighth* definition: "A decorative or artistic design, as for china, carpets, wall-papers, etc." *See* Brief for *Amici Curiae* In Support of Respondent [sic] ["State Attorneys General Brief"] at 10 & n.16 (citing to Oxford English Dictionary at 566).

B. RICO's Legislative History Also Supports Interpreting The "Pattern" Element To Require A Showing That The "Racketeering Activity" Was Typical Or Characteristic Of The Conduct Of The Allegedly Corrupt Person Or Enterprise

1. *Congress Intended to Protect Legitimate Businesses from Professional Criminals Without Attempting to Outlaw Directly Membership in Organized Criminal Associations*

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). Congress' declared purpose in passing the Act was "to seek the eradication of organized crime in the United States" through a variety of new penal provisions, investigatory tools, and remedies. *Id.* at 923. Congress' specific goal in forging the RICO title was to address the problem of infiltration of legitimate business by professional criminals. *United States v. Turkette*, 452 U.S. 576, 591 & n.13 (1981). Thus, Congress intended

> "that RICO be used against racketeers, individuals who earn their livelihood through the repetitive and continuous commission of criminal acts. The statute, properly read, is not a 'catch-all', but is instead a powerful tool to be used against racketeers and organized crime." *Gatoil (U.S.A.), Inc. v. Forest Hill State Bank*, 822 F.2d 55 (4th Cir. 1987) (unpublished opinion reported in 6 RICO L. Rptr. 316, 321).

See also International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987) ("Congress' intent [was] that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being").

The Organized Crime Control Act generally, and RICO specifically, were the culmination of almost two decades of intense study on how to dislodge organized crime from this nation's economic and social fabric. *See generally* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 838-40 (1980). The origins of the RICO title itself can be traced to a report issued in 1967 by President Johnson's Crime Commission. *See* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) [hereinafter "Katzenbach Report"]. The Katzenbach Report emphasized the problems presented by the infiltration of legitimate businesses by professional criminals and identified the principal methods by which that infiltration occurred:

> "Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." Katzenbach Report, *supra*, at 190.

These are the illicit methods that Congress ultimately decided to attack, in close paraphrase, in Section 1962(a)-(b) of RICO. *See* Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 681-82 (1987).

Before settling on a particular legislative formulation, though, Congress considered various means of attacking the infiltration of legitimate business by career criminals. The simplest of these approaches was to outlaw membership in the Mafia and other traditional organized crime syndicates. Indeed, as early as 1965 and again in 1967, Senator McClellan—who ultimately became one of the principal sponsors of RICO—introduced legislation to outlaw membership in just such organizations. *See* S. 2187, 89th Cong., 1st Sess., 111 Cong. Rec. 14680 (1965); S. 678, 90th Cong., 1st Sess., 113 Cong. Rec. 1595 (1967). Congress rejected that approach, however, because of fears that it would create a constitutionally suspect status-based offense. *See* Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corpora-

tion, Banking and Business Law 163-65 (1985) [hereinafter "ABA Report"]; 116 Cong. Rec. 35344 (1970) (remarks of Rep. Poff); *id.* at 35343-35344 (remarks of Rep. Celler).

2. *Congress Created and Then Tightened the "Pattern" Element as Part of the Effort to Arrive at a Functional Definition of Professional or Habitual Criminal Activity*

In structuring the title that became RICO, Congress did not alter its goal of attacking the infiltration of legitimate business by career criminals. Rather, it maintained that goal but focused its attention on a different method of attack that would not be constitutionally suspect: Defining organized crime functionally by the manner in which it acts. *See* ABA Report, *supra*, at 71-72; *see generally* Lynch, *supra*, 87 Colum. L. Rev. at 687-88. As Senator McClellan came to recognize, "organized crime" is not a "precise and operative legal concept." 116 ,Cong. Rec. 18913 (1970). Instead, he understood it to be a "functional concept" that serves "simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances." *Id.*; *see id.* at 35344 (virtually identical remarks of another principal sponsor of the RICO statute, Rep. Poff).

In 1969, Senator McClellan introduced S. 30, entitled the Organized Crime Control Act, which contained many of the organized crime recommendations of the Katzenbach Commission. When introduced, S. 30 did not have a RICO-type provision in it. During the same session, Senator Hruska introduced S. 1623, entitled the Criminal Activities Profits Act. *See* S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-6996 (1969). Senator Hruska stated that his legislation was "aimed specifically at racketeer infiltration of legitimate business." 115 Cong. Rec. 6993 (1969). This was not the first time Senator Hruska

had offered legislation aimed at the infiltration of legitimate business by organized crime. *See* S. 2049, 90th Cong., 1st Sess., 113 Cong. Rec. 18007 (1967). Like that predecessor, however, S. 1623 contained terms that swept so broadly as to include any person who invested proceeds of a *single* "criminal activity" in a legitimate business. S. 1623, *supra*.

After hearings were held on S. 30 and S. 1623 in April 1969, Senators Hruska and McClellan jointly introduced S. 1861, entitled the "Corrupt Organizations Act," which ultimately became, with some amendments, the basis of RICO. S. 1861 introduced many of the concepts now found in RICO, such as "enterprise" and "racketeering activity," and defined the three different forms of prohibited activity that appear in Section 1962(a)-(c). *See* S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568-71 (1969).

Most importantly, S. 1861 introduced the concept of "pattern" to tighten the functional net more compactly on career criminals than had Senator Hruska's earlier formulations. ABA Report, *supra*, at 87-88; *see also*, Lynch, *supra*, 87 Colum. L. Rev. at 688. Rather than linking liability to the commission of a *single* "criminal act", the bill provided that specific types of crimes had to form a "pattern" before RICO's substantive provisions would apply. ABA Report, *supra*, at 88.

After holding more hearings in mid-1969, the Senate Judiciary Committee reported out S. 30, the Organized Crime Control Act, which included as Title IX a revised version of the joint McClellan-Hruska bill, S. 1861. The most notable changes from S. 1861 to Title IX of S. 30 came in response to Justice Department comments. With regard to the "pattern" element, the Justice Department had argued during the hearings that the original description of the term contained in S. 1861 was too broad. In that first formulation of the term, the bill provided that the "term 'pattern of racketeering activity' *includes at*

least one act occurring after the effective date of this chapter." S. 1861, *supra* (emphasis added). The Justice Department objected because the term "pattern" indicated that "what is intended to be proscribed is not a single, isolated act of 'racketeering activity', but *at least two such acts.*" [3] Thus, the Justice Department suggested that the Committee amend S. 1861 to provide that the term "pattern" *means* at least two acts, one of which occurred after the effective date of this chapter." [4]

The Judiciary Committee adopted the Justice Department's recommendation to require "at least two acts," but, significantly, it chose to narrow the "pattern" element even further. Instead of defining "pattern" to "*mean*" at least two acts, as the Justice Department had suggested, the Committee provided that "'pattern of racketeering activity' *requires* at least two acts of racketeering activity, one of which occurred after the effective date of this chapter." S. Rep. No. 91-617, 91st Cong., 1st Sess. at 22 (1969) (emphasis added).

The Committee's refusal to define pattern to *mean* merely two acts of "racketeering activity" reflected a considered effort to narrow RICO to hard-core habitual or professional criminal activity. The Committee explained that it understood "pattern" to include a qualitative component as well as the expressed quantitative threshold:

> "*The concept of 'pattern' is essential to the operation of the statute* • • • The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. *It is this factor of continuity plus relationship which combines to form a pattern.*" *Id.* at 158 (emphasis added).

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[3] Hearings on Measures Relating To Organized Crime Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 405 (1969) [hereinafter "Senate Hearings"] (emphasis added).

[4] *Id.* (emphasis added).

During the floor debates that followed, Senator McClellan expressly reiterated that "proof of two acts of racketeering activity, *without more*, does not establish a pattern." 116 Cong. Rec. 18940 (1970) (emphasis added); *see also* McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties*, 46 Notre Dame L. Rev. 55, 144 (1970) ("commission of *two or more acts* of racketeering activity is made a necessary, but not a sufficient, element of a pattern under title IX") (emphasis added).[5]

Both the creation of the "pattern" requirement and the successful efforts to narrow it [6] reflected Congress'

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[5] The *amicus* brief filed by the Trial Lawyers for Public Justice erroneously suggests that Congress actually intended civil RICO to be a blunderbuss private weapon for attacking fraud in the marketplace. *See* TLPJ Brief at 12-13, 18, 22-23. It quotes from Senator Hruska's statements concerning S. 1623's private remedial provisions (TLPJ Brief at 5), but neglects to mention that the bill actually reported out of the Judiciary Committee, S. 30, contained *no* private RICO remedy. Although Senator Hruska's approach in S. 1623 was primarily to create a new civil remedy where none existed before, S. 30 relied exclusively on public enforcement through criminal, injunctive and forfeiture proceedings. The House later added a private damage provision to RICO with little or no discussion, and the Senate accepted the amendments in a similar manner. *See* ABA Report, *supra*, at 116-20.

Moreover, the Senate Judiciary Committee had added the so-called "predicate acts" of mail fraud, wire fraud and fraud in the sale of securities at the behest of the Securities and Exchange Commission at a time when RICO did not provide for *any* private damage remedy. The SEC's concern was narrowly focused on securities manipulations by organized criminal syndicates and their trading in stolen or counterfeit securities; the Commission and its Staff, to say nothing of Congress, did not contemplate that a private remedy would allow RICO to "implicate or replace the traditional private civil damages remedies under the various securities statutes," ABA Report, *supra*, at 99-100 n.130, let alone to become a general weapon for combating fraud.

[6] When S. 30 was later considered by the House of Representatives, the House tightened the threshold requirements of proving a "pattern" of criminality even further, adding a requirement that

continuing effort to create a formulation that would attack habitual or career criminals without sweeping in other criminals, much less people who are engaged primarily in lawful and respected business and professional endeavors. Indeed, when Senator McClellan and Representative Poff, another principal sponsor of RICO, responded to objections of the American Civil Liberties Union and the Association of the Bar of the City of New York that RICO's terms went far beyond proscribing organized crime's interference with legitimate business, they argued that RICO's provisions would have, at most, "an incidental reach beyond organized crime." 116 Cong. Rec. 35344 (1970); 116 Cong. Rec. 18914 (1970); *see id.* ("each title in S. 30 which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible"). They based that position principally on the protection afforded by the requirement of a "pattern:"

> "Title IX's list [of racketeering activities] does all that can be expected . . . it lists offenses committed by organized crime with substantial frequency, as part of its commercial operations. *The danger that commission of such offenses by other individuals would subject them to proceedings under title IX is even smaller* than any such danger under title III of the 1968 act [listing offenses subject to court-approved wiretapping] . . . . Unless an individual not only commits such a crime *but engages in a pattern of such violations*, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX." 116 Cong. Rec. 18940 (remarks of Sen. McClellan) (emphasis added). *See* McClellan, *supra*, 46 Notre Dame L. Rev. at 144 (same).

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the acts of racketeering must occur within ten years of each other. This third reformulation of the "pattern" concept was the one ultimately enacted into law. Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1020 (1980).

Moreover, the examples that Congress offered of the types of activity that it wished RICO to combat reaffirm that Congress intended to reach persons or organizations committed to *pervasive* criminality, and not aberrations in the activities of legitimate businesses and professionals.[7]

Thus, the legislative history of RICO generally, and the origins and evolution of the "pattern" requirement specifically, demonstrate that the Court should adhere to the ordinary meaning of "pattern" as "typical" or "characteristic" behavior. Any less stringent reading would be "irreconcilably at war with the clear congressional purpose" underlying RICO's adoption. *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971).

C. The Rule Of Lenity Also Supports The Interpretation Of "Pattern" To Require Allegations And Proof That The Criminal Behavior Was Characteristic Or Typical

Finally, the rule of lenity also supports the courts' application in RICO cases of the ordinary meaning of "pattern" as a reliably "typical" or "characteristic" sample of the conduct. *See Russello v. United States*, 464 U.S. at 29.[8] The rule of lenity counsels that terms in criminal

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[7] For example, Senator McClellan stated: "Organized criminals, too, have flooded the market with cheap reproductions of hit records and affixed counterfeit popular labels. They are heavily engaged in the illicit prescription drug industry." 116 Cong. Rec. 592 (1970). Similarly, the Senate Report noted how legitimate businesses were taken over and then looted in bust-out "scam" schemes involving bankruptcy fraud or insurance fraud. S. Rep. 91-617, *supra*, at 77. Senators Byrd and Dole spoke of how a racketeer had attempted, through arson and murder, to get A&P Tea Co. to buy mob-produced detergent that A&P had tested and rejected. 116 Cong. Rec. 607 (1970); 116 Cong. Rec. 36296 (1970).

[8] In both *Russello*, 464 U.S. at 29 and *Turkette*, 452 U.S. at 587-88 n.10, this Court recognized the applicability of the rule of lenity to RICO, but found in both cases that there was no occasion

statutes be strictly construed. The rule is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979). In this case, adopting the primary and ordinary meaning of "pattern," as opposed to the more nebulous definitions suggested by other courts and other litigants, would be consistent with the concern that underlies the rule of lenity, giving at least a "fair warning" when RICO's prohibitions—which are criminal as well as civil—may apply. *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

Petitioners here, among others, have argued that the Court should construe "pattern" as broadly as possible because of RICO's so-called "liberal construction clause," which states that RICO should be "liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947. The "pattern" requirement, however, is not a remedial provision at all; it is, instead, an essential element of any RICO violation—whether civil or criminal. *See* S. Rep. 91-617, *supra*, at 81. As this Court already cautioned in *Sedima*, the liberal construction clause does not displace the rule of lenity and thus does not justify broad interpretations of the substantive provisions of RICO that apply in both civil and criminal proceedings: "The strict- and liberal-construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c)." 473 U.S. at 492 n.10.

In *Sedima*, the issue was who may bring a civil suit under Section 1964(c), and thus the "liberal construc-

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to apply the rule to the statutory terms at issue because they were unambiguous. Here, by contrast, the term "pattern" does not unambiguously support broader interpretations than the one this brief offers, and therefore the rule of lenity provides further counsel against adoption of those broader and more vague interpretations.

tion" of RICO's remedial provisions applied. Here, in contrast, the issue is the meaning of the "pattern" element of criminal (and civil) liability established in Sections 1961 and 1962; thus, in this case, the operative principle is the rule of lenity's "strict construction."

II. THE CONTEXT IN WHICH THE "PATTERN" ELEMENT ARISES VARIES WITHIN RICO, AND ITS APPLICATION TO IDENTIFY CONDUCT THAT CHARACTERIZES HABITUAL CRIMINALITY MUST VARY DEPENDING ON THE RICO SUBSECTION AT ISSUE.

This Court recognized in *Sedima* that there are two critical facets in determining whether a number of acts of "racketeering activity" adequately make up a "pattern" of criminality: "continuity plus relationship." *Sedima*, 473 U.S. at 496 n.14. As this Court also noted in *Russello*, however, the meaning of a term can depend upon the context and structure of the statute in which it is used. *Russello*, 464 U.S. at 22-23; *see also Sedima*, 473 U.S. at 489; *Turkette*, 452 U.S. at 580-81. Thus, while "pattern" requires a showing of a "reliable sample" of acts that fairly "characterize" the relevant conduct as habitually criminal, the application of that requirement will vary depending on the particular subsection of Section 1962 that the prosecution or plaintiff invokes. *See* Comment, *The Pattern Element of RICO Before and After Sedima: A Look at Both Federal and Florida RICO*, 15 Fla. St. U.L. Rev. 321, 349 (1987) ("courts should consider pattern in terms of the particular section of RICO at issue. Arguably, this is precisely the meaning Congress intended when it chose not to be explicit about 'pattern'").[9]

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[9] There appears to be general agreement here that the "pattern" requirement would apply differently under the different subsections of Section 1962. *See, e.g.*, Brief of Petitioners at 33; State Attorneys General Brief at 15.

A. The "Relationship" Between The "Racketeering Activity" And RICO's Proscribed Conduct

The "relationship" aspect of the test recognizes that it is not sufficient simply to allege a laundry basket of disparate "racketeering activities" that, while occurring over time, have no relevant interconnection to RICO's proscribed conduct and so cannot be said to be a "reliable sample" of acts that fairly "characterize" the conduct as that of a professional criminal or a corrupt organization. For each RICO subsection the critical inquiry is whether the acts of racketeering are a central part of the plan to achieve what RICO outlaws—some prohibited effect on the enterprise that RICO seeks to protect from being "influenced or corrupted" by racketeers.

Under Section 1962(a), for example, the relationship aspect of the "pattern" test requires proof that the separate racketeering acts that generated the proceeds were tied together as part of a plan or scheme to invest in the enterprise. Similarly, under Section 1962(b), the "racketeering acts" must be related to each other in that the accused engaged in those acts in order to acquire or maintain control of the enterprise. Finally, under Section 1962(c), the predicate "racketeering" acts all must be related to conducting the affairs of the enterprise. *See, e.g., Torwest DBC, Inc. v. Dick*, 628 F. Supp. 163, 166 (D. Colo. 1986), *aff'd*, 810 F.2d 925 (10th Cir. 1987).[10]

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[10] The "racketeering" acts would not have to be related to each other in the sense that they are *similar*. That kind of requirement would make RICO inapplicable even to wholly criminal syndicates that engage in diverse criminal activity at different times and places in order to accomplish the goals that Section 1962 prohibits. *See, e.g., United States v. Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

B. The "Continuity" Of "Racketeering Activity" In Connection With RICO's Proscribed Conduct

The "continuity" branch of the "pattern" requirement has two features. First, a "pattern" cannot consist of what is essentially a single episode or transaction. There is no reasonable basis to infer that a person is a career or habitual criminal, properly within RICO's gunsights, if he has engaged only in what is essentially a single criminal transaction, even if as a technical matter it is possible to subdivide it into individual incidents of "racketeering activity." Many courts as well as the Justice Department's RICO Guidelines recognize that reliance on "isolated" or "sporadic" criminal events would eviscerate the "pattern" requirement and would convert into a RICO criminal or treble-damage case virtually any commercial dispute that one party wants to term fraudulent.[11]

To avoid that result, the "pattern" element must be understood as requiring allegations and proof of at least two acts of "racketeering activity" at substantially different times as a part of distinct criminal episodes or transactions. Thus, for example, virtually simultaneous multiple mailings of the same document may constitute multiple instances of mail fraud, but they do not in any true sense establish that the accused has engaged in a *course* of conduct that one normally associates with a "pattern" of behavior. The same is true about communicating a series of allegedly false letters or documents as part of the same set of business relationships.[12]

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[11] *See, e.g.*, 10 Department of Justice Manual, tit. 9, ch. 110, *RICO Guidelines*, §§ 9-110.340-341 (Prentice Hall 1988); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986); *Ghouth v. Conticommodity Services, Inc.*, 642 F. Supp. 1325, 1337 (N.D. Ill. 1986).

[12] *See, e.g., Tellis v. United States Fidelity & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1987) ("multiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the necessary pattern").

In addition, the "continuity" aspect of "pattern" reflects the core concept, that the acts of criminal racketeering are typical or characteristic of the conduct of the allegedly corrupt person or enterprise. That is, the continuing criminal activity must be a *substantial* rather than incidental part of the accused's relationship with the enterprise (in the case of subsections (a) and (b)) or of the conduct of the affairs of the enterprise (in subsection (c) cases). As courts have recognized in this regard:

> "[W]e do not stop at requiring a showing of multiple episodes because this alone does not adequately resolve the tension between isolated and ongoing activity. We find that RICO's purposes are best served by also requiring that, from the pleadings, a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. *Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing.*" [13]

This aspect of the "pattern" standard would require in a Section 1962(a) case a finding that the various acts of racketeering constituted a substantial portion of the actions by which the defendant generated the proceeds that he used to invest in the enterprise. If the proceeds had come mainly from legitimate sources, simply supplemented by the fruits of two or more illicit transactions, the investment of those proceeds could not be viewed as evincing a "pattern" of *criminal* activity. The same test would apply in determining whether the racketeering activity was substantially responsible for the accused's ability to acquire or maintain control of the enterprise in violation of Section 1962(b), and thus formed the necessary "pattern."

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[13] *Papai v. Cremosnik*, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986) (emphasis added); *see Thompson v. Wyoming Alaska, Inc.*, 652 F. Supp. 1222, 1228 (D. Utah 1987).

Section 1962(c) deserves special attention, because plaintiffs have used it most often to turn ordinary civil litigation into treble-damage RICO actions. *See, e.g.*, ABA Report, *supra*, at 57 (approximately 97% of civil RICO cases brought before 1985 relied on Section 1962(c)). Congress added Section 1962(c) in response to Justice Department criticism that RICO's predecessor proposals addressed only the acts of infiltration but not their aftermath, when the professional criminal actually operated the corrupted enterprise by a pattern of criminal acts. *See* Senate Hearings at 387; Lynch, *supra*, 87 Colum. L. Rev. at 682. Indeed, the Senate Judiciary Committee expressly recognized this critical notion, stating: "when organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses." S. Rep. 91-617, *supra*, at 77; *see also* McClellan, *supra*, 46 Notre Dame L. Rev. at 141 ("Once it invades a legitimate field of endeavor, the mob quickly brings with it a full range of corrupt practices"). Thus, the "pattern" standard under Section 1962(c) requires that the plaintiff allege and prove that racketeering acts are a substantial enough part of the enterprise's affairs that it is reliable to treat the enterprise as "corrupted," and not just involved in an incidental or aberrational crime.

III. OTHER PROPOSED INTERPRETATIONS OF THE "PATTERN" ELEMENT OF RICO FAIL TO CARRY FORTH ITS MEANING AND PURPOSE.

A. The "Multiple Transactions" Test

The interpretation based on "typicality" and evidence of habitual criminal behavior better implements the "pattern" element than the simple "multiple transactions" test that several circuits have embraced. *See, e.g., Sun. Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 193 & n.4 (9th Cir. 1987); *Elliott v. Chicago Motor Club, Ins.*, 809 F.2d 347, 349-50 (7th Cir. 1986). That test and other sim-

ilar formulations, *see, e.g., Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 38-39 (3d Cir. 1987); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987), add little as a practical matter beyond the threshold requirement of two acts of "racketeering" within ten years. In the modern economic world, almost any commercial relationship will involve a sufficient number of participants and will extend over a sufficiently long period of time that a competent attorney will be able to plead multiple "transactions" easily in almost any commercial civil litigation in which the plaintiff is willing to allege "fraud." *See, e.g., Exeter Towers Assoc. v. Bowditch*, 604 F. Supp. 1547, 1554-55 (D. Mass. 1985).

For instance, in the standard securities class-action in which the accounting firm is one of the "deep pocket" defendants, the plaintiffs typically allege that the company's financial statements, which are mailed to thousands of investors and usually reappear in several different audited statements, contain some "fraudulent" misstatement or non-disclosure, and that the accountants "knew of" or "recklessly disregarded" the alleged fraud when rendering the audit report. Under any of the formulations offered by the petitioners, the *amici* who support them, or the courts that have interpreted "pattern" to require only multiple "episodes" or "transactions," these ordinary securities law suits would probably remain RICO suits, even though it is obvious that in the typical case any misconduct would not fairly characterize the accounting firm, its audit partner, or its client as a habitual criminal or a basically corrupt organization.[14]

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[14] As evidence that "fraudulent financial reporting" is a "serious national problem," the Trial Lawyers for Public Justice cite the fact that "major accounting firms" have paid more than $180 million to settle liability suits since 1980. TLPJ Brief at 21. Apart from the fact that this assertion has nothing to do with whether Congress intended to have RICO reach false financial reports by publicly-held companies or their professionally licensed auditors, this Court already has recognized that defendants settle RICO suits for many reasons, and that the threat of treble-damages often makes the risks of defending oneself in a RICO case intolerable. As Justice Marshall wrote in *Sedima*: "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima*, 473 U.S. at 506 (Marshall, J., with Brennan, Blackmun and Powell, J.J., dissenting); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

B. The Interpretation Proposed By The Solicitor General

The Solicitor General as *amicus curiae* asserts that all "pattern" requires is "some common element or theme" between the racketeering acts, and urges this Court to adopt as the meaning of "pattern" in RICO the definition of the term "pattern of criminal conduct" found in 18 U.S.C. § 3575(e), which is part of Title X of the Organized Crime Control Act. Brief for the United States as *Amicus Curiae* Supporting Petitioners ["U.S. Brief"] at 9, 13-14; *see also* TPLJ Brief at 3. The Solicitor General asserts that the "use of the same term in a companion provision of the same statute strongly suggests that Congress intended the term to have the same meaning when used in RICO." U.S. Brief at 9. However, as the Solicitor General himself argued in another RICO case, *Russello*, and as this Court itself there recognized, the applicable rule of statutory interpretation is different:

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." 464 U.S. at 23 (citations omitted).[15]

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[15] In *Russello*, the defendant had urged the Court to interpret the term "interest" to have identical meanings in 18 U.S.C. § 1963(a)(1) and § 1963(a)(2). In response, however, the Solicitor General invoked the same precedent as the Court ultimately relied on in deciding the issue against the defendant. *See* Respondent's Brief at 21-22 & n.6, *Russello v. United States*, 464 U.S. 16 (1983).

Here, Congress used the term "pattern" differently in the two titles. In Title X, Congress defined the elements of a "pattern of criminal conduct" that satisfies various criteria, 18 U.S.C. § 3575(e), while the RICO title simply states what a "pattern of racketeering" minimally "requires," 18 U.S.C. § 1961(5), without further elaboration.

The different purposes that Title X and RICO serve also reinforce the propriety of recognizing that the "pattern" element was not intended to be the same in the two titles. Title X is a sentence-enhancing statute, and covers a wider range of criminal activities than RICO. A court can impose an enhanced sentence under Title X whenever any person commits *any* single felony as a part of a "pattern of criminal conduct" that constitutes a "substantial source" of his income or involves a conspiracy with three or more persons. 18 U.S.C. § 3575 (e)(2) and (3). RICO, by contrast, has a far narrower focus, both in terms of the criminal activities covered, 18 U.S.C. § 1961(1), and the additional functional requirements set forth in Section 1962. The RICO elements focus the statute on organized crime's impact on legitimate interstate business, and, in turn, expose that narrower category of professional criminal to far harsher penalties for conduct falling within its narrow bounds, including an additional 20-year prison term, forfeiture, divestiture, and private treble-damage liability. *See* 18 U.S.C. §§ 1963, 1964(a), (b), and (c). Thus, the definition of "pattern" in Title X does not properly carry over in RICO.

In urging the Court to import Title X's definition of "pattern" into RICO, the Solicitor General is forced to argue that the Court must ignore Congress' repeated references to "continuity" as an essential ingredient of a RICO violation. U.S. Brief at 8, 13. Yet, this Court already recognized in *Sedima* that "continuity" is an essential component of what Congress meant when it

spoke of a "pattern" of racketeering in RICO. The Solicitor General's approach, moreover, would make RICO far more sweeping than Congress intended, since it would mean that commission of any two predicates as part of the same "common scheme, plan or motive," *id.* at 18, without more, would constitute a "pattern" of racketeering.[16]

The Solicitor General himself recognizes that Congress did not intend that RICO be used in every instance in which two merely "related" predicate acts occur, and thus he later asserts that two racketeering acts that might be "related" to a single plan could fail to meet the "pattern" requirement because they would "still be 'isolated' acts" that lack "continuity" and thus, do not "reflect[] a risk of continuing harm to society." *Id.* at 14. In this manner, the Solicitor General concedes that "something more" than mere "relationship" is needed to meet the requirements for a RICO case.

While the Solicitor General appears to concede that the "something more" is required to satisfy the "pattern" requirement, he relies on RICO's other elements, specifically the requirement of an "enterprise," *id.* at 12, as a device for providing the "something more." He uses the rest of his brief to reiterate that, when the predicate acts "benefit a criminal enterprise," then the necessary "threat of continuity and hence the required pattern" is present. *Id.* at 18. Although the Solicitor General keeps saying that the "criminal enterprise" is but an "example" of the circumstances in which the "pattern" requirement is fulfilled through another element of a RICO case, he never offers any other examples.

The major flaw in the Solicitor General's vague formulation, which is hardly "articulable" to a trial jury,

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[16] It is true that the "pattern" element in Title X focuses *only* on whether the criminal acts are "interrelated." 18 U.S.C. § 3575(e). Thus, this more limited focus offers further reason why Title X cannot serve as a guide to interpreting RICO.

see Sedima, 473 U.S. at 494 n.12, is that his focus on the relationship between the predicate acts and a "criminal enterprise" would work only in a subclass of RICO cases. It does not have any evident bearing on RICO cases under subsection (a), which deals with investing pattern-derived proceeds in a presumably lawful enterprise, or subsection (b), which deals with acquiring or maintaining control of an enterprise, which may be legitimate or criminal, through a "pattern" of racketeering. Nor is it clear whether or how it would apply to any cases under subsection (c) involving otherwise legitimate enterprises, such as the parties here, Northwestern Bell and the Minnesota Public Utilities Commission.[17]

By contrast, the tests for the "continuity" and "relationship" aspects of the "pattern" element that we have outlined would give full effect to the statutory language and legislative purpose while applying to all types of RICO cases. In addition, measured against prosecutions that the government has already brought under the various subsections of Section 1962, the "pattern" test that we propose would fully protect the government's power to pursue habitual, organized criminality.

Under Section 1962(a), for example, the government may show, as it has done on past occasions, that the money the accused invested in the enterprise was substantially derived from racketeering activity and not from legal sources. *See, e.g., United States v. Cauble*, 706 F.2d 1322, 1334-43 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (majority of money invested in enterprise derived from drug-smuggling activities). Under Section 1962(b), the government may demonstrate, as it has readily done before, that the accused

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[17] The Solicitor General explicitly (and properly) rejects any suggestion that mere connection with "a legitimate enterprise" automatically would provide the "something more" needed to meet the "pattern" requirement. U.S. Brief at 19 n.10.

acquired or maintained an interest in the enterprise substantially through racketeering activity, and not primarily by legal means. *See, e.g., United States v. Local 560*, 780 F.2d 267, 271 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) (wide-spread acts of murder and extortion constituted substantial portion of activities by which defendants acquired interest in and control of local union); *United States v. Gambino*, 566 F.2d 414, 416-17 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978) (defendants acquired and maintained control of private sanitation industry in Bronx substantially through extortion, threatening to kill competitors, and administering beatings).

Similarly, under Section 1962(c), the government may continue to prosecute members of wholly criminal organizations because, by definition, those entities are corrupt organizations whose very existence demonstrates that their affairs are substantially conducted through means of criminal activities. *See, e.g., United States v. Turkette*, 452 U.S. at 579; *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). The government may also use RICO to prosecute members of otherwise legitimate enterprises under Section 1962(c), when it can demonstrate that they conducted a substantial portion of its affairs through criminal means, thus demonstrating that, in the words of the title of the statute, the enterprise has become in substance a "corrupt organization." *See, e.g., United States v. Local 560*, 780 F.2d at 272 (union's affairs permeated by and conducted substantially through criminal means of murder and extortion); *United States v. Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (banks' affairs conducted substantially through illegal activities of mail and wire fraud, leading to banks' collapse).

IV. UNDER THE PROPER INTERPRETATION OF "PATTERN," THE JUDGMENT BELOW IS CORRECT.

In three counts of their complaint, petitioners ("plaintiffs") alleged that the defendants had violated RICO because of nine instances of alleged bribery over a five-year period. *See* J.A. I. Under the proper understanding of the "pattern" element, plaintiffs' complaint was inadequate because they failed to allege in it directly or by inference that the alleged "racketeering activity" was a substantial portion of the relevant conduct under each of the counts.

As to the count under Section 1962(a) (Count II), there is no allegation that a substantial portion of the money that Northwestern Bell invested in itself during the five-year period at issue was generated by the allegedly criminal acts. To the extent that it is plausible to credit allegations that acts of alleged bribery enabled Northwestern Bell to acquire or maintain an "interest in or control of" the Minnesota Public Utilities Commission within the meaning of Section 1962(b), there is no allegation that Northwestern Bell's ability to influence the Commission's regulatory decisions resulted primarily or substantially from the alleged "racketeering activity" rather than from ordinary filings and argument, and thus Count III must fail. Finally, the claim in Count IV under Section 1962(c) is deficient because there is no allegation or basis for inferring that the illegal activity alleged against Northwestern Bell characterized or typified the conduct of the Minnesota Public Utilities Commission because it represented a substantial portion of the way that enterprise conducted its activities under Northwestern Bell's influence.[18]

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[18] Plaintiffs also alleged that defendants conspired to violate RICO. J.A. I at 81; *see* 18 U.S.C. § 1962(d). Since the underlying RICO claims are not adequately pleaded, the conspiracy count also fails. *See, e.g., Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 927 n.2 (10th Cir. 1987).

In sum, the plaintiffs have not alleged all of the elements necessary to demonstrate the requisite "pattern" of pervasive criminality. Therefore, the district court properly dismissed the RICO claims, and the court of appeals properly affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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